



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of Collins Outdoor Advertising Sign
on the South Side of USH 14-61 in the NE ¼ of
the SE ¼, Section 3, T14N, R6W, Vernon County,
Wisconsin (Old Towne Inn Sign)

Case No. 98-H-1099

In the Matter of Collins Outdoor Advertising Sign
on the North Side of USH 14-61 in the NW ¼ of
the SE ¼, Section 25, T14N, R5W, Vernon
County, Wisconsin (Schmidt Motor Sign)

Case No 98-H-1100

FINAL RULING ON MOTION FOR SUMMARY JUDGMENT

By letter dated August 26, 1998, Collins Outdoor Advertising Sign (Collins) requested a hearing to review two sign removal orders issued by the Department of Transportation (Department). On October 19, 1998, the Department referred the request to the Division of Hearings and Appeals for hearing. A hearing was scheduled in these matters for January 20, 1999.

On January 20, 1999, the Department filed a Motion for Summary Judgment and brief in support of its motion in the above-captioned matters. The hearing scheduled in these matters was cancelled and a briefing schedule for the motion was established. Collins filed its response brief on February 26, 1999. The Department filed a reply brief on March 19, 1999. On April 12, 1999, Collins filed the affidavit of Paul Gagnon as authentication for the Relocation Cost Schedule which was submitted with its brief. On April 21, 1999, the Department filed a response brief and the affidavit of Nancy Maieski in rebuttal to Paul Gagnon's affidavit.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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The Administrative Law Judge (ALJ) issued a proposed ruling granting the Motion for Summary Judgment on September 20, 1999. Collins did not file any comments on the proposed decision; however, it requested that the effective date of the order affirming the Department's removal orders be held in abeyance for sixty days. Collins was requesting this time to give it an opportunity to salvage the materials from the subject signs. Collins cited no authority or precedent for this request. The timing of the removal of the subject signs is best left to negotiations between the parties.

The Department filed comments in support of the Proposed Ruling and arguing that findings should also be made that the subject signs were illegally enlarged, were illegally replaced, and were not substantially the same as the destroyed grandfathered signs. The Department made the same arguments in its briefs in support of its Motion for Summary Judgment. The ALJ made no findings on these issues because the Department's removal orders for the subject signs was affirmed on the basis that the signs had been destroyed. The proposed ruling is adopted as the final ruling in this matter. For the same reasons as in the proposed ruling it is unnecessary to make findings on the other issues raised by the Department.

The procedure for summary judgment for civil actions in circuit court is governed by sec 802.08, Stats. For purposes of this ruling the procedure applicable for civil actions will be followed. The purpose of summary judgment is to obviate the need for a trial where there is no genuine issue to any material fact. Heck & Paetow Claim Service, Inc. v Heck, 93 Wis. 2d 349, 286 N.W.2d 831 (1980). Summary judgment is not available if any disputed facts exist or if reasonable inferences leading to conflicting results may be drawn on the basis of uncontested facts. Tomlin v. State Farm Mut. Auto Liability Ins. Co., 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

The methodology for summary judgment is that the court first examines the pleadings to determine whether claims have been stated and a material fact issue is presented. If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party has made a *prima facie* case, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether genuine issues exist as to any material fact, or reasonable conflicting inferences may be drawn from undisputed facts, and therefore trial is necessary. In re Cherokee Park Plat, 113 Wis. 2d 112, 334 N.W.2d 580 (App. 1983).

The relevant facts with respect to the two subject signs are relatively straightforward and are essentially undisputed.

Old Towne Sign

The sign that is referred to as the Old Towne Inn Sign is located along the south side of State Trunk Highways 14 and 61, 0.23 miles east of County Trunk Highway "N" in the NE ¼ of the SE ¼, section 3, T14N, R6W, Town of Hamburg, Vernon County and was erected prior to 1972. The area where the sign is located is unzoned and is not within a business area as defined by sec. 84.30(2)(b), Stats. The sign structure consisted of six utility poles used as support poles. To the wooden support poles, two-inch by six inch wooden cross members were nailed and a metal sign face was nailed to the cross members. The sign is owned by Collins.

The sign had two metal faces. The sign face facing west was forty feet by ten feet in size and advertised "Old Towne Inn." The sign face facing east was twenty feet by ten feet and advertised "Pepsi." At some point, the metal sign face facing west was replaced with a wooden face that was nailed to the cross members. In 1973 the sign was approximately four feet in height above ground level (HAGL). At some point the height of the sign was increased to approximately ten feet HAGL. Also sometime after 1972, lights were added to the sign and a vinyl covering with ad copy was attached to the sign. (Docken deposition, pages 14-15 and Cowell deposition, pages 8-11).

On June 27, 1998, the sign structure was blown over by a windstorm. The wooden support poles were broken and the sign was damaged. Collins "repaired" the subject sign. In the course of repairing the sign, the six wooden support poles were replaced with four steel I-beams. Additional steel cross members were welded to the steel I-beams. Two inch by six-inch lumber was then bolted to the steel substructure. The sign face panels are now fastened to two inch by six-inch boards and are covered with a vinyl sheet onto which advertizing copy is attached.

Schmidt Motors Sign

The sign referred to as the Schmidt Motors Sign is located along the north side of United States Highways 14 and 61, 2310 feet east of Volden Road in the NW ¼ of the SE ¼, section 25, T14N, R5W, Town of Coon, Vernon County and is owned by Collins. This sign was also erected prior to 1972. A business was established within six hundred feet of the sign in approximately 1982, and Collins obtained a permit for the sign in approximately 1986. In 1995 the business closed and the sign reverted to a legal, nonconforming status at that time. The sign consisted of steel poster sections attached to nine wooden utility poles. One half of the sign face consisted of a "poster panel" display; the other half had a vinyl rap display. The size of the sign face was fifty feet by twelve feet. (Docken deposition, pages 13-14).

This sign was also blown over and damaged during the June 27, 1998 windstorm. In repairing the damage, Collins replaced the nine wooden support poles with four steel I-beams set in concrete. Steel angle iron cross members were welded to the steel I-beams. One of the steel poster sections was replaced. The other steel poster section was reused on this sign. (The steel poster section that was not reused on this sign was used by Collins on a different sign.) Before

the windstorm the height of the sign face was approximately twelve to fourteen feet HAGL. At the time of the repair, the height was increased to approximately twenty feet HAGL. A T111 apron was also added to the sign for aesthetic purposes.

The two signs that are the subject of this matter are located at sites for which no sign permit can be issued. However, the signs were in existence at the time the sign law (sec. 84.30, Stats.) became effective and were allowed to be maintained as legal nonconforming signs. The administrative rule regulating the maintenance of nonconforming signs is sec. Trans 201.10(2), Wis. Adm. Code. Section Trans 201.10(2), Wis Adm. Code provides, in relevant part, as follows:

In order to lawfully maintain and continue a nonconforming sign, or a so-called grandfathered sign under s. 84.30 (3) (d), Stats., the following conditions apply:

(d) The sign must have been lawful on the effective date of the state law and must continue to be lawfully maintained.

(e) The sign must remain substantially the same as it was on the effective date of the state law, and may not be enlarged. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Customary maintenance ceases and a substantial change occurs if repairs or maintenance, excluding message changes, on a sign exceeds 50% of the replacement costs of the sign.

(f) The sign may continue as long as it is not destroyed, abandoned or discontinued. A sign shall be considered destroyed if it is damaged in excess of 50% of its replacement cost.

After the signs were repaired, the Department issued removal orders to Collins for each of the subject signs on July 8, 1998, alleging the signs were illegal. The Department in its motion alleges that based on the undisputed facts in this matter, the subject signs have lost their legal nonconforming status and are subject to removal without compensation. In the briefs filed in support of the motion, the Department argues several alternative bases by which the signs have lost their nonconforming status. Of these alternative arguments, the most persuasive one is that the subject signs were both damaged in excess of fifty percent of their respective replacement costs and; therefore, can not be maintained as legal nonconforming signs.

Pursuant to sec. Trans 201.10(2)(f), Wis. Adm. Code, a legal nonconforming sign "may be continued as long as it not destroyed, abandoned or discontinued. A sign shall be considered destroyed if it is damaged in excess of 50% of its replacement cost." The issue in this case is whether the subject signs were damaged in excess of fifty percent of their respective replacement costs. The cost of the repairs performed on the subject signs is in the record. What is not explicitly in the record is the replacement costs of the signs at the time they were destroyed.

Collins argues that the figures in an agreement between the Outdoor Advertising Association of Wisconsin and the Department setting forth relocation costs for condemned signs should be used. For the Old Towne Inn sign the rebuilding cost according to the schedule is \$8276.00 and the cost to rebuild the Schmidt Motors sign is \$10,530. These figures were negotiated for purposes of paying compensation for signs that were condemned. They were not negotiated for the purpose of determining replacement costs of destroyed signs and are irrelevant for purposes of this Motion for Summary Judgment. The exhibit that was submitted with Collins' response brief is one page of a 23-page document. The page contains the note "Schedule is intended to cover most sign situations." Insufficient information is provided to determine which situations are not covered by the schedule; however, in a situation, such as the instant case, in which the actual replacement cost can be calculated, it is clearly more appropriate to use the actual replacement cost rather than this general schedule.

The fact that the schedule greatly overstates the rebuilding costs of the two signs that are the subject of the hearing can be shown using Collins' documents. For its discussions with the Department prior to requesting a hearing, Collins produced job invoices for each of the signs. The invoice for the Old Towne Inn sign is identified as job No. 8177 and is in the record as part of Docken deposition exhibit 4. On this exhibit, Collins initially itemizes the cost of rebuilding the Old Towne sign and then subtracts the value of materials from the damaged sign that were either reusable or recyclable. (The remainder after subtracting the value of reusable or recyclable material is the figure that Collins originally argued was the repair cost of the sign.) The figure on this document before subtracting the value of reusable or recyclable material is the replacement cost of the Old Towne Inn sign as computed by Collins. This figure is \$3803.79. The rebuilding cost for a sign the size of the Old Towne Inn sign according to the relocation schedule is \$8276.00. The comparable figures for the replacement cost of the Schmidt Motors sign is \$4493.25 as calculated by Collins (Cowell deposition exhibit 1) and \$10,530 from the relocation schedule.

The materials used by Collins when it repaired the subject signs were substantially different from the materials originally used for the signs. Specifically, Collins replaced many of the wood components with metal when it repaired the signs. Therefore, one can not use Collins' calculations to determine the replacement costs of the two signs as they existed prior to the June 1998 windstorm. Although the replacement costs of the subject signs as they existed prior to the windstorm are not set forth in the record, a reasonable approximation can be calculated from the evidence in the record.

With respect to the Old Town Inn sign, the sign prior to the windstorm consisted of six wooden support poles to which were nailed wooden stringers. A wooden sign face was nailed to the wooden stringers. Attached as exhibit three to the deposition of Bruce Cowell are two price lists for wooden poles of various lengths. The record does not indicate the length of the poles used for the pre-storm sign; however, the I-beams that were used to rebuild the sign were 40 feet in length. It is reasonable to use the price for the same length pole in calculating the replacement costs. The elevation of the sign was raised when it was repaired; therefore, if anything, using the price of 40-foot poles overstates the replacement cost of the Old Towne Inn Sign.

On the price list of Bell Lumber and Pole Company, the costs for a forty-foot long pole is \$343.00. On the price list from Lake States Lumber, Inc., the price of a forty-foot long pole is \$335.45. (Cowell deposition exhibit 3) Using the higher figure of \$343.00 per pole, and multiplying it by the six poles that comprised this sign structure prior to its being repaired, the costs of poles would be \$2058.00. Other replacement costs would be the wooden stringers, 200 feet of two inch by six inch, by sixteen foot boards at \$1.10 per foot totaling \$220.00 and 10 feet by 40 feet by one-half inch MDO plywood sections priced by Collins at \$580.00.

The Department does not include labor when calculating the replacement costs of signs; however, labor is a significant component of the costs of constructing a sign and should be included. Collins listed the labor for repairing the sign at a total of \$568.95. Since the sign was essentially rebuilt, it is reasonable to assume that a similar amount of labor would be necessary to replace the sign. If anything, this again overstates the costs of replacing the sign since undoubtedly a portion of the labor on the document prepared by Collins was for tearing down and clearing the debris of the previous sign. The costs of travelling to the sign site should also be included in the replacement costs of the sign. This also should be the same for repairing the damaged sign as for replacing the sign. Collins lists travel costs of \$71.40.

Two other items that should be included in the replacement costs of the sign are the costs of lights at \$400.00 and the vinyl pre-painted sign surface that is pulled over the wooden sign face. Collins estimated the cost of the vinyl cover and the expense of painting it at \$400.00 (Cowell deposition, pages 19-20). If these items were added to the sign after it became a legal nonconforming sign, it is debatable whether they were lawfully part of the sign. For purposes of this decision, it will be assumed that these two components were lawfully part of the sign prior to its destruction and could be repaired. The net effect is to add \$800.00 to both replacement costs to the sign and to the cost of rebuilding the sign. With these figures, the total cost of replacing the sign is \$4298.35 (\$2058.00 + \$220.00 + \$580.00 + \$568.95 + \$71.40 + \$400.00 + \$400.00)

To calculate the cost to repair the sign, the figures supplied by Collins are the only evidence in the record. The repair cost of this sign as estimated by Collins is \$3803.79. (Docken deposition, exhibit 4). However, from this number one should subtract the cost of the ten by forty by one half-inch MDO sections and 75 feet of two inch by six-inch lumber. The deposition testimony was that this lumber was not reused on the Old Towne Inn sign; however, since it was reused on another sign, presumably, it could have been reused on the Old Towne Inn sign. In order to give Collins the benefit of the doubt the cost of this lumber will be subtracted from the total repair costs.

In its calculation, Collins also subtracted the salvage value of six twenty-foot wood poles (the length of the support poles after the sign was blown over). These poles could not have been reused on the repaired sign. There is no basis to deduct the salvage value of these poles from the cost of repairing this sign. Similarly, Collins deducted the salvage value of the ten foot by twenty foot "Pepsi" sign face that was not reused on repaired sign. It is not clear whether the "Pepsi" sign face was not reused because after Collins decided to replace the wooden support poles with steel I-beams it was not practical to reattach this sign face to the repaired structure or whether the advertiser no longer wanted this sign face on this sign structure. For whatever reason the "Pepsi" sign face was not reused on this sign, there is no basis to deduct the salvage

value of this sign face from the repair costs for the sign.¹ This leaves a total repair costs of \$3141.29. The repair cost of the sign exceeds fifty percent of the replacement cost of the sign, which was calculated at \$4298.35 ($\$3141.29/\$4298.35 = 73\%$).

A similar analysis can be done with respect to the Schmidt Motors Sign. In this case the replacement costs includes nine wood support poles at \$343.00 for a total of \$3087.00, metal sheeting for the sign face at \$1150.28, and two hundred feet of angle iron at \$178.00. The cost of labor for this sign is \$785.00 and travel to the sign site is \$190.40;. The total of these figures is \$5390.73. The repair costs for this sign as calculated by Collins is \$4493.25 (Cowell deposition exhibit 1). Deducting the two sets of twelve-foot by 25-foot metal sections that were reusable results in a net repair cost of \$3342.97. This total exceeds fifty percent of the replacement cost of the sign ($\$3342.97/\$5390.73 = 62\%$).

The Department alternatively argues that the subject signs have lost their nonconforming status because they have been substantially changed, enlarged, or relocated. Because the signs were damaged by the windstorm in excess of fifty percent of their respective replacement costs, it is not necessary to discuss the merits of these arguments.

Collins argues that although it used different materials, all it did is replace two damaged signs with comparable signs. Without getting to the merits of the Department's argument that replacing wood elements with metal constitutes a substantial change in a legal nonconforming sign in violation of sec. Trans 201.10(2)(e), Wis. Adm. Code, as a policy matter one must keep in mind that the legislative intent is that nonconforming signs disappear over time. This intent is stated in the federal regulations relating to nonconforming signs. The paragraph addressing grandfather clauses provides that "[t]his clause only allows an individual sign at its particular location for the duration of its normal life subject to customary maintenance." In repairing the subject signs, Collins has essentially rebuilt the sign using all new material with the result that it has significantly extended the normal life of these two signs. This is not the intent of allowing the maintenance of nonconforming signs.

In calculating the repair costs of the two signs as a percentage of the respective replacement costs, it should also be noted that the only reason these figures are as close to fifty percent as they are is because of the disparity between the costs of wooden poles and steel I-beams. As noted above, Collins essentially rebuilt the two signs after they were blown over by the windstorm. Arguably, one could use Collins' figures for repair costs as the replacement cost for the two signs and the repair costs would be almost one hundred percent of the replacement costs. Bruce Cowell testified at his deposition that one of the reasons Collins replaced the wooden support poles with steel I-beams was because steel I-beams were less expensive than wooden poles. In calculating the replacement costs of these signs there is no logical reason to do so using the cost of wooden poles rather than steel I-beams other than to consider the evidence in the manner most favorable to Collins.

¹ An argument could be made that the \$692.00 cost for the "Pepsi" sign face should be added to the replacement cost of the sign. This would increase the replacement cost of the sign to \$4990.35 ($\$4298.35 + \692.00). However, because this sign face was not replaced on the repaired sign it is questionable whether this should be considered. Regardless even if the replacement cost of the sign is increased to \$4990.35, the repair costs as set forth by Collins still exceeds fifty percent ($\$3141.29/\$4990.35=62.9\%$).

In summary, the repairs made by Collins to the two subject signs exceed fifty percent of the replacement value of the respective signs. Pursuant to sec. Trans 201.10(2)(f), Wis. Adm. Code, these signs can not be maintained as legal nonconforming signs.


Final Ruling

The Department's Motion for Summary Judgment is granted and the removal orders issued by the Department are affirmed.

Dated at Madison, Wisconsin on October 18, 1999.

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